

FORCENERGY INC.
KIDD FAMILY PARTNERSHIP LTD.

IBLA 97-359, 98-209

Decided October 15, 1999

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, terminating Federal oil and gas leases WYW-107737 and WYW-131678 by operation of law, and denying request for waiver of lease rights.

Motion to Consolidate granted; decision affirmed in IBLA 97-359; IBLA 98-209 dismissed as moot.

1. Oil and Gas Leases: Reinstatement--Oil and Gas
Leases: Termination

A BLM decision terminating Federal oil and gas leases by operation of law for failure to timely pay rental is properly affirmed when the lessee fails to file a petition for reinstatement within 60 days after receipt of the Notice of Termination, pursuant to 30 U.S.C. § 188(d) and (e), and 43 C.F.R. § 3108.2-3(b)(1)(i) and (ii).

2. Evidence: Presumptions--Oil and Gas Leases:
Reinstatement

Appellant's request to vacate BLM's decision terminating Federal oil and gas leases is properly denied when BLM records indicate the receipt of only one of three rental checks allegedly sent in the same envelope, and Appellant has failed to overcome the presumption of administrative regularity by submitting evidence that the checks were not only properly transmitted but actually received.

APPEARANCES: Laura Lindley, Esq., Denver, Colorado, for Appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Forcenergy Inc. (Forcenergy), formerly known as Forcenergy Gas Exploration Inc., has appealed an April 16, 1997, decision of the Wyoming

State Office, Bureau of Land Management (BLM), holding that oil and gas leases WYW-107737 and WYW-131678 terminated by operation of law on March 1, 1996, for failure to pay rental. This appeal was docketed as IBLA 97-359. Also, Forcenergy and Kidd Family Partnership Limited (Kidd), owners of the above-cited leases, have appealed a February 11, 1998, decision of the Wyoming State Office, BLM, denying their request for waiver of lease rights under 43 C.F.R. § 3108.5 for the leases at issue because the leases were terminated by operation of law on March 1, 1996. This appeal was docketed as IBLA 98-209.

Forcenergy and Kidd have filed a Motion to Consolidate the two above-described appeals for consideration and disposition "[b]ecause the issues involved in [IBLA 98-209] are interrelated with the issues pending in [IBLA] 97-359." BLM does not oppose Appellants' request. Accordingly, for good cause shown, the motion is granted.

On May 22, 1996, Kidd was served with notices of oil and gas lease termination informing it that leases WYW-107737 and WYW-131678 had terminated by operation of law because rental payments had not been received on or before March 1, 1996, the anniversary of the effective dates of the leases. The record indicates the effective dates of lease WYW-107737 and lease WYW-131678 were March 1, 1988, and March 1, 1994, respectively. The notices also advised that, pursuant to 30 U.S.C. § 188(d) and (e) and 43 C.F.R. § 3108.2-3, Kidd had a right to petition for Class II reinstatement of the leases within 60 days after receipt of the notices, provided certain conditions and procedures were met.

The record also shows that on May 28, 1996, and June 17, 1996, Kidd filed with BLM Assignment of Record Title Interest requests for WYW-107737 and WYW-131678, respectively. By notices dated July 25 and July 29, 1996, BLM denied Kidd's assignment requests and stated: "The proper annual rental was not paid in a timely manner [to the Minerals Management Service (MMS)] and, therefore, the lease automatically terminated by operation of law (30 U.S.C. 188) on March 1, 1996. The termination has become final."

By letter filed August 7, 1996, Forcenergy responded to BLM's notices of July 25 and 29, 1996, and enclosed photocopies of the fronts of record copies of rental checks it claimed to have timely sent to MMS for leases WYW-131678 and WYW-107737. Forcenergy requested that BLM "vacate the terminations of these leases and approve the assignments."

On September 12, 1996, Kidd again filed an assignment of working interest for lease WYW-131678, including copies of Forcenergy's letter filed August 7, 1996, "along with a canceled check showing that the delay rental was in fact paid in a timely manner." We note that Kidd's reference to a copy of a "canceled check" is in error, since the record shows that only the face of Forcenergy's rental check for MMS WYW-131678 was copied.

By notice dated September 25, 1996, BLM returned without approval Kidd's request for assignment of the working interest for lease WYW-131678. BLM's notice stated:

You had sixty days from the date of receipt of your termination notice, which you received on 5/22/96, to provide proof that the rental was timely paid. Although you did send a copy of the front of the check, it is not stamped in by Minerals Management Service. We requested you send a copy of the back of the check on August 8, 1996, which we did not receive.

(Notice of Sept. 25, 1996, at 1.)

By letter dated October 10, 1996, Forcenergy responded to BLM's September 25, 1996, letter to Kidd, reiterating that it had mailed lease payment checks for the subject leases to MMS and asserting that it could not explain why the checks had not been endorsed by MMS, presented for payment, and cleared Forcenergy's bank. Forcenergy again asked BLM to vacate the lease terminations and offered to "submit rental payments again in whatever manner you wish." (Letter of Oct. 10, 1996, at 1.) On April 16, 1997, BLM rendered a decision finding that the subject leases had terminated by operation of law. BLM's decision reads, in pertinent part:

On November 15, 1996, we received, via facsimile, copies of the fronts of the checks for WYW 107737 and WYW 131678, a copy of a certified card which had been received by MMS which had no lease number on it, and a copy of the back of a check for lease WYW 117620 which did not terminate. However, there was no proof that the checks for leases WYW 107737 or WYW 131678 were ever received by MMS. As such we cannot vacate the termination of these leases.

(Decision of April 16, 1997, at 1.)

In its Statement of Reasons (SOR), Forcenergy submits the same evidence discussed above (Exhibits 1A, 1B, 1C), along with the affidavits of three Forcenergy employees responsible for various actions in the lease rental payment process (Exhibits 3, 4, and 5), an affidavit from counsel describing an unrelated situation in which the MMS Office for Revenue and Document Processing, Denver Federal Center, Lakewood Compliance Division, apparently misplaced a client's SOR and later found it (Exhibit 6), and photocopies of rental payment checks for the subject leases for the 1997 rental year which show that they were received by MMS and date-stamped on February 24, 1997. (Exhibits 7A and 7B).

Additionally, as Exhibit 2 to its SOR, Forcenergy submits a copy of a postal return receipt card stamped as received on January 29, 1996, by Champion Messenger, P.O. Box 6954, Denver, Colorado 80206, identified as "agent for the Minerals Mgt Service." This exhibit includes a copy of the opposite side of the card, showing Forcenergy's address, along with

a handwritten notation which reads: "Attn: Land Dept. Lease # 117620, WY 1700032, WY 1700098." We note that Exhibits 1B and 1C show that Forcenergy's internal record-keeping system identified lease WYW-131678 as lease WY 1700032, and lease WYW-107737 as lease WY 17000098. Exhibit 1A is a photocopy of the front and back of Forcenergy's lease payment check #117620, which Forcenergy claims was mailed in the same envelope as lease payment checks for leases WYW-107737 and WYW-131678. Exhibit 1A indicates that MMS endorsed check #117620 and presented it for payment.

Forcenergy argues that if MMS received the envelope containing the three checks and endorsed one and presented it for payment, it must also have had possession of the other two on January 29, 1996, and then lost or misplaced them. Further, Forcenergy asserts that the circumstantial evidence it presents in support of its proposition that MMS received rental payment checks for leases WYW-107737 and WYW-131678 "is sufficient to overcome the rebuttable presumption of administrative regularity and therefore the advance rentals for Leases WYW-107737 and WYW-131678 should be deemed to have been timely received and Forcenergy should be given an opportunity to furnish substitute checks in payment of those rentals." (SOR at 3.)

Forcenergy argues that the evidence it has presented "is at least as substantial as that which the Board found persuasive in L.E. Garrison, 52 IBLA 131 (1981)." (SOR at 3.) Additionally, Forcenergy relies on E. Joe Swisher, 44 IBLA 44, 47 (1979), wherein a miner asserted he had enclosed proofs of labor within the statutory deadline and produced a receipt for certified mail, date stamped within the deadline, and upon which he had written "1978 Proofs." Forcenergy points out that while the Board found that the miner's evidence was not dispositive, it did find that there was a strong probability that the miner had in fact enclosed his proofs of labor in the certified mail item, and it concluded that he had done so. Forcenergy further argues that the Swisher analysis should be applied to the facts of its case.

In its Reply, BLM argues that Forcenergy has failed to show by a preponderance of the evidence that the presumption of administrative regularity should be set aside. BLM points out that Forcenergy's agents and employees could have erred in preparing, mailing, or delivering the rental payment checks:

Appellant's argument assumes facts not in evidence, that is, that the appellant's employees followed their own somewhat complex, proper procedures. It is just as likely as not that the appellant's own employees either a) misplaced the checks themselves, or b) missent the checks, or c) failed to follow their own procedures. Notwithstanding that the appellant's employees believe they didn't make a mistake, it's at least as likely that they did and that the MMS did not.

(Reply at 1, 2.)

Further, BLM asserts that the precedent relied upon by Forcenergy derives from mining fee decisions by the Board in which one person, the miner, had custody and control of proofs of labor or filings that he sent by certified mail to BLM. In the instant case, BLM argues, Forcenergy's payments of annual rentals for oil and gas leases were prepared and forwarded to MMS by employees and agents who were charged with following and managing a complex payment system. BLM relies on Monturah Co., 10 IBLA 347, 348 (1973), to argue that "it is well established that lessee[s] cannot use the complexity of their business organization to hide behind their own employee[s]' failure to make rental payments on time." (Reply at 2.)

BLM quotes our decision in Jerald A. Waters, 94 IBLA 150 (1986), to argue that "placing a check for rental in the mail does not constitute tender of a lease rental." Id. at 252. Moreover, citing Davis Oil Co., 79 IBLA 218 (1984), and Jack J. Grynberg, 53 IBLA 165 (1981), BLM argues that in cases where several rental payments were allegedly sent together, but BLM records failed to show that all were received, the Board was unwilling to find that it was more likely that the employees of MMS rather than those of appellant were responsible for the mistake.

[1] Federal leases terminated for failure to timely remit the annual rental may be reinstated under two separate provisions. The Act of May 12, 1970, 84 Stat. 206, as amended, 30 U.S.C. § 188(c) (1994), authorized the Secretary to reinstate a lease only if the rental payment was paid or tendered within 20 days after the due date and the lessee established that the failure to timely pay was either justifiable or not the result of the lessee's lack of reasonable diligence. Reinstatement under this provision became known as a Class I reinstatement. In 1983, Congress adopted additional provisions, codified at 30 U.S.C. § 188(d) and (e) (1994), which permit reinstatement of leases not eligible under the provisions of the 1970 Act, provided the lessee shows that failure to timely pay was "inadvertent." Reinstatements under the 1983 Act became known as Class II reinstatements.

Section 401 of the Federal Oil and Gas Royalty Management Act of 1982, 96 Stat. 2462, 30 U.S.C. § 188(d) (1994), specifies the time requirements for a Class II reinstatement. Title 30 U.S.C. § 188(d)(2)(B) provides that the petition for reinstatement, together with the required back rental, must be filed on or before "the earlier of -- (i) sixty days after the lessee received from the Secretary notice of termination * * *, or (ii) fifteen months after the termination of the lease." See also 43 C.F.R. § 3108.2-3(b)(1)(i) and (ii).

The record shows that on May 22, 1996, BLM served Kidd with Notices that leases WYW-107737 and WYW-131678 had terminated by operation of law because rental payments had not been received on or before March 1, 1996, the anniversary of the effective dates of the leases. The Notices also informed Kidd that, pursuant to 30 C.F.R. § 188(d) and (e) and 43 C.F.R. § 3108.2-3, it had a right to petition for Class II reinstatement of the leases within 60 days after receipt of the Notices.

Since Forcenergy failed to file a petition for reinstatement together with the required back rental within 60 days of the date of receipt of the Notices, it does not qualify for Class II reinstatement. Jerry D. Powers, 85 IBLA 116, 119 (1985), and cases cited.

[2] Forcenergy correctly argues that the lease terminations can be vacated if MMS locates the 1996 rental payment checks and establishes that they were timely filed and tendered for payment. Regarding Forcenergy's claims that MMS may have mishandled or misplaced the 1996 rental payment checks for leases at issue, we reiterate the well-settled rule that he who selects a means of delivery assumes the risk that the agent may not deliver the item identified for delivery or may not deliver the item in time to meet a deadline. Morgan Richardson Operating Co., 126 IBLA 332, 333 (1993).

Forcenergy submits a certified receipt card showing that it mailed the rental payments for the subject leases on January 29, 1996, and that MMS received an envelope purporting to contain the lease payment checks on January 29, 1996, over 1 month before the lease anniversary dates of March 1, 1996. However, MMS has no record of receiving the checks.

In circumstances where an appellant was required to file a document and MMS has no record of receiving it, there is a legal presumption of regularity which attends the official acts of public officers in the proper discharge of their duties. Administrative officials are presumed to have properly discharged their duties by not losing or misplacing legally significant documents submitted for filing. Wilfred Plomis, 139 IBLA 206, 208 (1997), and cases cited.

This Board accords great weight to the presumption of regularity. In Carl A. Peterson, 73 IBLA 347, 348 (1983), we said:

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. H.S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). However, a statement that a lease rental check was enclosed in the same document together with other documents that were received by BLM must be corroborated by other evidence to establish filing where there is no evidence of receipt of payment in the file. R.E. Frasch, 69 IBLA 66 (1982).

In the case at hand, Forcenergy submits a certified receipt card to show that MMS received an envelope purporting to contain 1996 annual rental payments for leases WYW-107737 and WYW-131678, but submits no evidence that the checks were actually received by MMS. Likewise, while Forcenergy submits affidavits of its administrative employees describing how the subject checks were prepared and asserting that the checks were enclosed in the envelope identified by the certified receipt card, Forcenergy fails to

present evidence to overcome MMS' contention that it never received the subject checks. The evidence in this case indicates that it is just as likely that checks were misplaced by Forcenergy as by MMS. A similar situation existed in Richard W. Kulis, 72 IBLA 251, 252-253 (1983), wherein we held that neither an affidavit that a check was enclosed in the same envelope with other documents that were received by the agency, nor a presentation of a check register showing that the check was issued to the agency but not cashed constituted the "convincing and uncontradicted evidence" required to overcome the presumption of administrative regularity. Our holding in Kulis is applicable here.

In summary, we find that: (1) Leases WYW-107737 and WYW-131678 terminated by operation of law when the lessee of record failed to comply with the provisions of 30 U.S.C. § 188(d) and the regulation at 43 C.F.R. § 3108.2-3(b)(1); and (2) Forcenergy's evidence in support of its argument that the lease terminations should be vacated fails to overcome the presumption of administrative regularity. We also find that Appellants' appeal of BLM's denial of their request for waiver of lease rights is rendered moot by the above findings.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's decision in IBLA 97-359 is affirmed, and the appeal docketed as IBLA 98-209 is dismissed as moot.

John H. Kelly
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge